

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20054**

In the Matter of	)	
	)	
Amendment of Parts 1, 22, 24, 27, 74, 80, 90,	)	WT Docket No. 10-112
95, and 101 To Establish Uniform License	)	
Renewal, Discontinuance of Operation, and	)	
Geographic Partitioning and Spectrum	)	
Disaggregation Rules and Policies for Certain	)	
Wireless Radio Services	)	

**PETITION FOR PARTIAL RECONSIDERATION OR CLARIFICATION**

Pursuant to Section 1.429 of the Commission’s Rules, American Messaging Services, LLC (“American Messaging”) hereby seeks partial reconsideration or clarification of the Commission’s *Second Report and Order* in this proceeding.<sup>1</sup> The Commission should revise or clarify the application of its new safe harbor certification rule to renewal applicants in the messaging services. Specifically, an applicant qualifies for the safe harbor if it certifies that it met all performance requirements and continues to provide service, and that no permanent discontinuance of operation occurred during the license term. This limited action will ensure that messaging licensees demonstrate at renewal that they are serving the public, while minimizing the unwarranted burdens that the rule would otherwise impose on them.

**I. SUMMARY**

The *Second Report and Order* adopted an entirely new framework for renewal applications in most wireless radio services, which includes a far more extensive renewal

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<sup>1</sup> *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95 and 101 to Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services*, Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 10-112, FCC 17-105 (rel. Aug. 3, 2017).

showing requirement, and a “safe harbor” that licensees can meet and thereby avoid making the renewal showing. The new safe harbor rule creates a dichotomy between geographic and site-based licensees: Geographic licensees must meet the onerous requirement that they certify they complied with coverage requirements throughout their license term.<sup>2</sup> But this requirement is unwarranted for messaging services, because it does not account for the fact that licensees such as American Messaging rely on *both* site-based and geographic licenses, and in a number of instances with overlapping service areas, and deploy that mix of licenses to best serve their customers.

The safe harbor rule is also a radical departure from long-standing Commission policies favoring light regulation and a competitive marketplace as the best ways to maximize spectrum resources. And, it imposes substantial burdens on messaging providers, which will be forced to continuously measure and tabulate their coverage month after month and year after year to be able to certify they did not fall below the coverage requirements. The option of instead filing a detailed renewal showing that the FCC will review on a case-by-case basis using unclear criteria introduces uncertainty into the license renewal process and is not a viable alternative.

The Commission should thus modify the safe harbor rule (or clarify how it will operate) to reflect the mix of geographic and site-based licenses used by the messaging industry. The safe harbor should be available to a renewal applicant if it can certify that it has complied with all performance requirements and that it continues to provide service in its licensed area, and has experienced no permanent discontinuance. This action will mitigate the unnecessary yet costly

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<sup>2</sup> 47 C.F.R. § 1.949(e). Although American Messaging did not file comments on the *Notice of Proposed Rulemaking* in this proceeding, that *Notice* did not discuss or propose a safe harbor rule. The *Second Report and Order* for the first time in in this proceeding discussed such a rule. American Messaging thus did not have an opportunity to present the facts and arguments in this Petition until after the adoption of the *Second Report and Order*. Moreover, consideration of these facts and arguments serves the public interest by addressing important issues that the *Second Report and Order* did not address. See 47 C.F.R. § 1.429(b). Reconsideration is therefore appropriate. The Commission can also clarify the rule by order.

monitoring and recordkeeping burdens that the rule would impose on the messaging industry.

But it will assure the Commission that messaging licensees are serving the public.<sup>3</sup>

## **II. THE SAFE HARBOR DOES NOT ACCOUNT FOR THE FACT THAT MESSAGING PROVIDERS SERVE CUSTOMERS THROUGH A MIX OF GEOGRAPHIC AND SITE-BASED LICENSES.**

American Messaging is one of the largest messaging companies in the United States, delivering more than three million messages per day to pagers, smart phones, tablets and personal computers. It provides service to approximately 800,000 subscribers of more than 1,400 major health care, public safety and first responder clients across the U.S. The company holds several hundred geographic area licenses and more than a thousand site-based narrowband licenses, including licenses in the paging and radiotelephone, narrowband personal communications and private land mobile services.

The messaging industry, due to its unique regulatory history, uses both site-based and geographic licenses, often overlapping, to provide seamless service to subscribers. Two decades ago the Commission awarded geographic area licenses in the paging and radiotelephone service to supplement existing site-based licenses. Incumbent site-based licensees were able to bid through an auction for geographic licenses which could encompass their existing service contours.<sup>4</sup> Because of this history, messaging licensees often have numerous overlapping site-based as well as geographic licenses they employ to provide coverage. In messaging, changes in geographic license coverage do not necessarily mean changes in service to the public, because site-based licenses operate in tandem with geographic licenses. American Messaging constantly

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<sup>3</sup> American Messaging does not seek changes to the Commission's new permanent discontinuance rule, 47 C.F.R. §1.953.

<sup>4</sup> *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Second Report and Order, 12 FCC Rcd 2732 (1997) ("*Paging Systems Order*").

seeks to optimize its network and serve customers by integrating its operation of site-based and geographic licenses.

The *Second Report and Order* assumed that a licensee holding a geographic license serves customers in a market only through that license, and thus that reducing coverage of the geographic license reduced the licensee's service. The safe harbor certification accordingly states that the licensee "continues to use its facilities to provide at least the level of service required by its final performance requirement through the end of any subsequent license terms."<sup>5</sup> But this assumption is incorrect for the messaging services, and the Commission did not discuss those services or their integrated network design. It thus did not contemplate that a licensee may serve customers through a combination of both types of licenses. In fact, site-based messaging licenses supplement geographic licenses to provide service that responds to customer demand.

In addition, the safe harbor rule's requirement to maintain coverage at or above geographic coverage requirements was written to address mass market consumer services provided by broadband mobile wireless services, but does not reflect the role of the messaging industry today. The one-third and two-thirds population coverage benchmarks that were adopted decades ago<sup>6</sup> for paging and narrowband PCS may have made sense when they were services aimed at mass market consumers in direct competition with broadband mobile wireless carriers,

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<sup>5</sup> 47 C.F.R. § 1.949(e)(2). The Commission clarified that "licensees who temporarily drop below their construction benchmark for fewer than 180 days may avail themselves of the safe harbor." *Second Report and Order* at ¶ 22. But this clarification still obligates licensees to constantly monitor their service levels to ensure they do not fall below the minimum coverage requirement for longer than that period and to be at that requirement when they seek renewal. It does not solve the burdens the rule places on messaging licensees.

<sup>6</sup> See *Paging Systems Order* at ¶¶ 180-182; 47 C.F.R. § 22.503(k) (coverage requirements for paging and radiotelephone service); 47 C.F.R. § 24.203 (coverage requirements for narrowband personal communications service).

but are inappropriate renewal criteria, given that the messaging industry now serves a narrower customer base of health care providers, first responders, and businesses.

### **III. THE SAFE HARBOR RULE DEPARTS FROM FCC POLICY FAVORING LIMITED WIRELESS REGULATION, AND IMPOSES COSTLY NEW BURDENS ON MESSAGING LICENSEES.**

The Commission's longstanding framework for overseeing the wireless industry relies on competitive market forces, supplemented by limited regulation that is imposed only when clearly needed.<sup>7</sup> Its previous renewal application procedures were consistent with that policy, supplied licensees with clear direction, and worked well. The Commission recognized that simple and straightforward renewal requirements were sufficient because, after satisfying applicable performance benchmarks, licensees have every economic incentive to provide coverage and service in their license area to compete to win and retain customers. The safe harbor rule's requirement that geographic licensees certify that they have continuously met the performance requirements is a significant departure from Commission policy.

In addition, the new rule imposes burdensome new monitoring and recordkeeping requirements. In order to be able to make the safe harbor's coverage and service certification, licensees will have to continuously measure and tabulate coverage, on a license-by-license basis, in order to ensure that they do not fall below their previous construction benchmark. These calculations are complex, labor intensive and costly to produce, and will discourage licensees from modifying their systems. Worse, they must be conducted continuously, with records maintained throughout the ten-year license term for each geographic license, an onerous mandate

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<sup>7</sup> Discussing Section 332 of the Communications Act governing mobile wireless services, which Congress enacted as part of the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), the Commission declared: "OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and states could demonstrate a clear cut need." *Petition of the Connecticut Department of Public Utility Control*, Report and Order, 10 FCC Rcd 7025 ¶ 10 (1995).

that will seriously burden messaging providers which have very limited financial and personnel resources – particularly in comparison to large mobile broadband providers that were the primary focus of the *Second Report and Order*.

The integrated use of site-based and geographic licenses to provide service complicates and increases the resources needed to complete the ongoing calculations required. But in the case of messaging licensees, these calculations would not achieve the stated purpose of the certification, to demonstrate ongoing compliance with coverage minimums. The reason is that, as noted above, messaging licensees provide service to their customers through the dynamic deployment of both site-based and geographic licenses, so that the level of coverage in a market provided through one license will not necessarily determine the percentage of a market's population that is actually covered by this integrated network. Put another way, constant metering of the physical coverage of a single geographic messaging license will not supply an accurate measure of the licensee's actual coverage area.

These flaws with the new safe harbor rule are not alleviated by the option messaging licensees have to instead file a detailed renewal showing. Commenters demonstrated that this showing would be impractical and burdensome, and would introduce uncertainty into the license renewal process, because the standards the Commission would apply to evaluate the renewal showing were vague and would be applied case-by-case. The Commission acknowledged these concerns by adopting the safe harbor certification process, stating, "We agree that clearer and more certain renewal processes will benefit both licensees and the Commission."<sup>8</sup>

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<sup>8</sup> *Second Report and Order* at ¶ 16.

#### **IV. THE FCC SHOULD SIMPLIFY THE SAFE HARBOR CERTIFICATION.**

The Commission should correct these problems with the new safe harbor rule by simplifying the certification requirements. Specifically, messaging licensees should be allowed to certify that they (1) satisfied all applicable initial and final performance requirements, (2) provided coverage and service in their license area during the license term that is expiring, and (3) no permanent discontinuance occurred during the license term. The Commission can take this action either by amending the rule or by clarifying it through an order.

This three-part certification is still more than was required under the previous license renewal rules for these services, because those rules required licensees to make only a substantial service showing to claim a renewal expectancy, and licensees only needed to make that showing if they were challenged by a competing license application, which rarely occurred. This revised rule or clarification will also be more manageable for messaging licensees than continually measuring, tabulating and maintaining coverage metrics on a license-by-license basis throughout the license term. It will thus achieve what the Commission declared to be one of the “major objectives” of this proceeding: “to simplify the regulatory process for licensees.”<sup>9</sup>

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<sup>9</sup> *Id.* at ¶ 3.

**V. CONCLUSION**

For the above reasons, the Commission should revise or clarify the safe harbor rule to simplify the renewal process for licensees in the messaging services.

Respectfully submitted,

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